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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1216

NISHAN PAUL,

Petitioner

vs.

DADE COUNTY, FLORIDA, a Political Subdivision of the State of Florida, et al.

Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner, NISHAN PAUL, filed his Petition for WRIT OF CERTIORARI in the United States Supreme Court on March 9, 1968. The Respondent, DADE COUNTY, FLORIDA, a political subdivision of the State of Florida, et al., certified for mailing its brief in opposition to Petitioner's Petition for Writ of Certiorari on April 12, 1968. The following is the Petitioner's Reply to the Respondent's Brief in Opposition.

For purposes of clarity, we shall examine the "Questions Presented" by the Respondent in the chronological order they appear in the Respondent's Brief. The Petitioner will utilize italics for emphasis.

POINT I

DOES PAUL HAVE STANDING TO SUE?

The thrust of the Respondent's argument in Point I is that the Petitioner, as a Dade County taxpayer, lacks standing to challenge the expenditure of County Tax funds under Florida case law. In addition, the Respondent cites the U.S. Supreme Court opinion in *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394. The Petitioner herewith offers his rebuttal.

First, the U.S. Supreme Court determines for itself, within the confines of the United States Constitution, its own requirements for Standing, and, therefore, State Court pronouncements as to U.S. Supreme Court jurisdiction in terms of Standing, are and always have been regarded as *advisory*. In fact, the very case cited by the Respondent, *Doremus v. Board of Education* (Supra), makes this point abundantly clear. The opinion stated on page 397:

> "We do not undertake to say that a State Court may not render an opinion on a Federal Constitutional Question even under such circumstances that can be regarded only as *advisory*. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for con-

clusive disposition of an issue of Federal law without review, any procedure which does not constitute such."

With this principle firmly established, we turn to the case of *Crampton v. Zabriskie*, et al. 101 U.S. 601, 609, 25 L.Ed. 1070. The factual situation in this case is identical to that of the case at bar in reference to the question of Standing. Does a County Taxpayer have Standing to challenge expenditure of county funds before the United States Supreme Court as determined by Federal requirements of "case or controversy". The opinion, delivered by Mr. Justice Field, stated in part:

> "It does not appear that any attention was paid either by the Board or Crampton, to this judgment. The Board did not reconvey or offer to reconvey the land to Crampton; nor did the latter return or offer to return to the Board the bonds received by him. But, on the contrary, Crampton commenced an action in the Circuit Court of the United States to enforce their payment. . . . The facts here stated are not contradicted; . . ."
>
> "*Of the right of resident tax payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question.* The right has been recognized by the state courts in numerous cases; and from the nature of the powers exer-

> cised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporations."

As further support for this principle, please see *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Cochran v. Louisiana State Board of Education*, 50 S.Ct. 335 (1930) wherein Standing presented no barrier to the hearing of taxpayers' suits.

Thus, the Respondent has completely misinterpreted *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597 which stated simply that a taxpayer's interest in the *Federal Treasury* was too remote to challenge a *Federal Appropriation Act*. The case at bar involves that of a County taxpayer challenging County expenditure of

tax funds, after all State Court remedies have been exhausted.

Secondly, even assuming that Standing as interpreted by the Florida Supreme Court is an issue before this Court, the Respondent is in complete error as to its interpretation of the Florida Supreme Court position pursuant to the Florida Declaratory Judgment Act. In *Rosenhouse v. 1950 Spring Term Grand Jury*, 56 So.2d 445, the Florida Supreme Court made its position clear on Page 448:

> "The appellant has alleged that he is a taxpayer and that the challenged acts authorize the expenditure of public moneys; that he is in doubt as to the constitutionality of said legislative enactments and, consequently, has grave doubt with reference to the legality of the expenditure of public funds as authorized by the statutes which he deems unconstitutional.
>
> "The Circuit Court is authorized to adjudicate the question of the constitutionality of a statute in a declaratory judgment proceeding. See McInerney v. Ervin, Fla. 46 So.2d 458. *Indeed, such procedure has been used on innumerable occasions to attack the constitutionality of a statute or charter and the appellant as a taxpayer has the right to institute such action because of his interest in the expenditure of public moneys.* Mitchell v. Consolidated School District #201, 17 Wash. 2d 61, 135 P.2d 79, 146 A.L.R. 612. Almquist v. City of Biwabik, 224 Minn. 503, 28

N.W. 2d 744; Beuchamp v. Silk, 275 Ky. 91, 120 S.W. 2d 765.

"We approve the statement made by the Supreme Court of Alabama in the case of White v. Manassa, 252 Ala. 396, 41 So.2d 395, 397, 'The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention, but whether he is entitled to a declaration of rights at all.' "

The *Rosenhouse* case was approved and followed in *Bacon v. Crespi* 141 So.2d 823.

In reference to the Respondent's position that private funds were used, or if public funds were used, the Petitioner's contribution was minimal, please see pages 12 and 13 of the Petitioner's Petition for Writ of Certiorari wherein the Respondent's contention has previously been exposed as sham.

POINT II

DO THE COURTHOUSE CHRISTMAS DECORATIONS, INCLUDING THE LIGHTED LATIN CROSS, VIOLATE ANY FEDERAL CONSTITUTIONAL PROVISION?

On page 15 of the Respondent's Brief, the Respondent asks the Court to take cognizance of Bishop Duncan's testimony referring to a "secular purpose" and "wishing the public seasons greetings". What the Respondent failed to

point out is that the Petitioner produced five (5) clergymen all testifying as experts on theology, and all testifying, after viewing exhibit 5 entered into evidence (exhibit "C" in the appendix of the Petitioner's Petition for Writ of Certiorari) that the Latin cross, as displayed on the Dade County Courthouse, does not represent "seasons greetings" or "Merry Christmas", but, in fact, is a Christian symbol representing scorn, rejection, humiliation and death.

On page 16 of the Respondent's Brief, the Respondent denies that the Equal Protection argument made by the Petitioner is valid, and in so doing, cites *Murray v. Comptroller of the Treasury Maryland*, Md. 216 A.2d 897 (1966). The Respondent failed to note, however, that in *Murray v. Comptroller of the Treasury Maryland*, supra, all houses of worship were benefitted from the tax exemption. In the case at bar, the only religious symbol the county will and does erect on the Courthouse is the Latin cross. The Respondent denies discrimination, but please see exhibit "E" attached to the Petitioner's Petition, said exhibit being the Minutes of the June 20th, 1966, meeting of the Dade County Board of Commissioners wherein it stated on page 27:

> "It was moved by Commissioner R. Hardy Matheson that a star be placed on the courthouse in lieu of the cross. This motion died for lack of a second."

On page 18 of the Respondent's Brief, the Respondent states:

> "The cross does not support any religious activity or religious institution."

We find this statement so incredible as to not warrant any response. Please note further, that on page 18 of the Respondent's Brief, the Respondent discusses *purpose*, but scrupulously avoids the *effect* of the cross; the other half of the test laid down in *Abington School District v. Schempp*, 374 U.S. 203 (1963).

The Respondent further asserts on page 19 of its brief:

> "It is well to note that in *Fowler v. State of Rhode Island*, (1953) 345 U.S. 67, this Court held that public property could be used for church services."

This is a complete misstatement of that case. This Court never ruled that public property could be used for church services. What this Court ruled is that the denial of use of the park to Jehovah Witnesses while permitting Protestants and Catholics use of the park is discriminatory and a denial of Equal Protection. The question concerning use of public property by churches was not before the Court and consequently not passed upon.

On pages 20 and 21 the Respondent states that the U.S. Supreme Court did not hold religious symbols made by school children, baccalaureate services or a religious census unconstitutional in *Chamberlain v. Dade County Board of Public Instruction* (1964) 377 U.S. 402, 12 L.Ed. 407, 84 S.Ct. 1272. Respondent failed to mention, however, that the United States Supreme Court did not pass judgment on these issues, but solely on the issues of Bible reading and prayer.

POINT III

WAS THE PETITION FOR CERTIORARI TIMELY FILED?

The County alleges that the Petitioner did not timely file his petition for Writ of Certiorari in the U.S. Supreme Court. In making this charge, the County alleges that the District Court of Appeal of Florida, Third District, was the highest court of this State in which the decision could be had, and further, that the time period for filing in the U.S. Supreme Court commenced from the decision date of the Opinion of the District Court of Appeal of Florida, Third District. The Respondent is in error on both counts.

In reference to the highest court in which a decision could be had, please note Article 5, Section 4, of the Florida Constitution which is identical to Florida Appellate Rule II (5) (b).

> "Appeals from district courts of appeal may be taken to the Supreme Court as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or Federal Constitution. The Supreme Court may review by certiorari any decision of the district court of appeal that affects a class of constitutional or state officers or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue

writs of certiorari to commissions established by law."

The Petitioner sought a Writ of Certiorari in the Florida Supreme Court pursuant to this constitutional and appellate rule requirement. The Petition was denied on December 13th, 1967. Petition for Writ of Certiorari was then filed in the U.S. Supreme Court within ninety (90) days from said denial by the Florida Supreme Court. Respondent attempts to buttress its argument with the case of *Nash v. Florida Industrial Commission*, 88 S.Ct. 362. The case, however, is easily distinguished from the case at bar. In the *Nash* case, the appellant sought a Writ of Certiorari from the District Court of Appeal, said petition being denied per curiam. In the case at bar, there was no petition for a Writ filed in the District Court of Appeal, nor was there a denial to hear the case by the said District Court, nor was there a per curiam decision by the District Court. In the case at bar, the Petitioner filed an *Appeal* in the said District Court of Appeal, *the Appeal was heard, a decision was rendered on the merits, and said decision was written by Judge Swann.* It was from this decision that a Petition for Writ of Certiorari was properly filed in the Supreme Court of Florida pursuant to Article 5, Section 4, of the Florida Constitution and Rule II (5) (b) cited above.

In reference to the Respondent's companion charge, that the time period should have run from the date of the District Court of Appeal decision as opposed to the Florida Supreme Court's denial of the Petition for Writ of Certiorari, please see the opinion of Mr. Justice Holmes in *American Railway Express Co. v. Levee*, 263 U.S. 19 wherein he states:

"Of course the limit of time for applying to this Court was from the date when the writ of certiorari was refused."

Respondent ends its brief on pages 22 and 23 by stating:

"Actually Paul admits the District Court of Appeal was the highest court of this state in which the decision in this case could be had. His motion for certifying the record to this Court was filed in that Court not the Florida Supreme Court. Moreover, his petition is directed to the District Court and the Florida Supreme Court. He does not seek a review of the latter court's denial of jurisdiction but only the District Court's decision."

In answer to the charge as to the Petitioner filing his motion for certifying the record in the District Court of Appeal, the Respondent is aware that the said District Court happened to be in physical possession of the record and therefore was the only Court capable of certifying the record at that particular moment. Respondent knows this because it filed its own motion for certification in the same court.

In reference to the charge that the Petitioner seeks only review of the District Court's decision, we call attention to the opening statement found in the Petitioner's Petition for Writ of Certiorari filed in this Court, stating:

"Petitioner prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, and the denial

of Petitioner's Petition for Writ of Certiorari by the Supreme Court of Florida, entered in the above styled case on October 3rd, 1967 and December 13th, 1967 respectively."

WHEREFORE, the Petitioner urges this Court to grant its Petition for Writ of Certiorari filed on March 9th, 1968.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari has, pursuant to the Rules of the Supreme Court of the United States, been served by mail, upon the County Attorney. County of Dade, Florida, this 23rd day of April, 1968.

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